169

No. 10-(1)

Supreme Court, U.S.
FILED
10-274 JUN 21 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GILLIAN B. LOYA, as Personal representative of the Estate of Ricardo D. Loya, Deceased, and as Litigation Guardian *Ad Litem for* I.L. and G.L., the Surviving Minor Children of the Decedent, Richardo D. Loya, and Estate of RICHARD D. LOYA,

Petitioners,

v.

STARWOOD HOTELS & RESORTS WORLDWIDE INC., d/b/a Westin Hotel Company, d/b/a Westin Regina Golf & Beach Resort and Club Regina Westin Hotel Company d/b/a Westin Regina Golf and Spa Resort; CORPORATION MEXITURE S.A. de C.V., d/b/a Xplora Adventours Los Cabos; PADI WORLDWIDE; PADI AMERICAS; JOHN DOES, 1-5, RAINTREE RESORTS INTERNATIONAL INC., d/b/a Club Regina; WESTIN HOTEL MANAGEMENT LP; WHISKI JACK RESORTS AND CLUB; RESORT CONDOMINIUMS INTERNATIONAL LLC; DOUGLAS BECH; RAINTREE VACATION CLUB; WALKER HARMON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SCOTT E. STAFNE
STAFNE LAW FIRM
17207 155th Avenue N.E.
Arlington, Washington 98223
(360) 403-8700
stafnelawfirm@aol.com

Attorneys for Petitioners

QUESTIONS PRESENTED

This case involves the application of the procedural doctrine of forum non conveniens by the United States District Court for the Western District of Washington to dismiss a wrongful death action brought by an American widow in her home forum in admiralty seeking the exclusive damage remedy Congress provided Americans pursuant to the Death on the High Seas Act, 46 U.S.C. App. § 761. The questions presented are as follows:

1. Whether the procedural doctrine of forum non conveniens can be used to dismiss an American's action in her home forum to a foreign jurisdiction which will not provide a substantially equivalent remedy to the exclusive remedy afforded by Congress to her and her children pursuant to the Death on the High Seas Act?;

2. What is the standard regarding that amount of deference which must be afforded to an American tourist's choice of his/her home forum for an injury occurring while traveling abroad? Do the conflicting decisions of the Eighth, Ninth and Eleventh Circuits need to be uniform?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Appendices	iii
Table of Cited Authorities	iv
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	1
Statement of Facts	3
Reasons for Granting the Petition	5
Conclusion	24

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed October 2, 2009 ..... 1a

Appendix B — Order Of The United States District Court For The Western District Of Washington At Seattle Dated And Filed July 6, 2007 ..... 26a

Appendix C — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing Filed March 22, 2010 ..... 52a

Appendix D — House Report 54a

TABLE OF CITED AUTHORITIES

Page

Supreme Court Cases:

American Dredging Co. v. Miller,
510 U.S. 443 (1994) 12, 13

Atlantic Sounding Co., Inc. v. Townsend,
129 S.Ct. 2561 (2009) 6, 13

Dooley v. Korean Air Lines Co.,
524 U.S. 116 (1998) 8, 12

Koster v. (American) Lumbermens Mut. Casualty Co.,
330 U.S. 518 21

Marshall v. Marshall,
547 U.S. 293 (2006) 14

Mobil Oil v. Higginbotham,
436 U.S. 618 (1978) 6, 11, 13

Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811 (2001) 13

Offshore Logistics, Inc. v. Tallentire,
477 U.S. 207 (1986) 11

Piper Aircraft Co. v. Reyno,
454 U.S. 235 (1981) 10

Cited Authorities

Page

The Harrisburg,
119 U.S. 199 (1886) 7

Zicherman v. Korean Air Lines Co.,
516 U.S. 217 (1996) 12

Ninth Circuit Cases:

Contact Lumber Co. v. P.T. Moges Shipping Co.,
918 F.2d 1446 (9th Cir. 1990) 22

Other Court Cases:

Fen v. Sanko Kisen Corp.,
441 F.Supp. 45 (S.D.N.Y. 1977) 6

In Re Air Craft Crash Off of Long Island,
65 F.Supp. 2d 207 (S.D.N.Y. 1999) 14

Lehman v. Humphrey Cayman Ltd.,
713 F.2d 339 (8th Cir. 1983) 15, 16, 17

Pain v. United Tech. Corp.,
637 F.2d 775 (D.C. Cir. 1980) 5, 6, 14

Reid-Walen v. Hansen,
933 F.2d 1390 (8th Cir. 1991) 18, 19, 22

Vasquez v. Bridgestone,
325 F.3d 665 (5th Cir. 2003) 22

Cited Authorities

Page

Wilson v. Humphrey's (Cayman),
916 F.2d 1239 (8th Cir. 1990) 17, 18

Wilson v. Island Sea Adventures,
590 F.3d 1264 (11th Cir. 2009) 19

Statutes:

RCW 64.36.320(2) 4

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 6

46 U.S.C. App. § 742 9

46 U.S.C. App. § 761 ..... i, 1, 7, 10

46 U.S.C. App. § 762 ..... 2, 7

46 U.S.C. App. § 764 ..... 2, 10

Congressional Record:

House Report 111-521 (2010) 14

Scott Stafne, attorney for Petitioners Loya, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Order of the Court of Appeals Denying En Banc Review, March 22, 2010 (App. A). The Opinion of the Court of Appeals, October 2, 2009 (App. B). The U.S. District Court Granting Summary Judgment, July 6, 2007 (App. D).

JURISDICTION

The Court of Appeals entered its judgment on 2nd day of October 2009. The Petition for Enbanc Review was denied by Court of Appeals on March 22, 2010. The jurisdiction of the court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Death on High Seas Act, 46 U.S.C. App. 761 (a) et seq. provides in pertinent parts follows:

> (a) Subject to subsection (b) of this section, whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may

> maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S.C. App. 762

> a) The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

46 U.S.C. App. 764

> Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

STATEMENT OF FACTS

The District Court dismissed this wrongful death action brought by a U.S. family for the death of an American on the High Seas. The action was brought pursuant to the Death on the High Seas Act (DOSHA) in the American plaintiffs' home forum. The DOSHA action was dismissed to facilitate the convenience of the District Court and defendants pursuant to the supervening venue doctrine known as forum non conveniens (FNC).

The District Court found that damages in Mexico would be limited to about $12,000-13,000, and that the American beneficiaries would be required to spend about $50,000 to secure that remedy. Thus, the best result this American family could receive in Mexico is a net loss of $32,000.00 not including the costs of going to trial in Mexico, a foreign country, which would be substantial.

Gillian Loya's husband, Ricardo, died in a scuba diving accident off the Mexican coast where he was vacationing at the Westin Resort & Spa Los Cabos in San Jose del Cabo, Baja California Sur. The Loyas went to Cabo with friends who exchanged a timeshare they had at Whistler for one at Club Regina Los Cabos, the timeshare portion of the Westin resort that is owned by Raintree Resorts. Loya stated in a declaration that before traveling to Mexico her husband, a Washington resident, allegedly read printed advertisements and internet advertisements in Washington State stating that scuba diving activities arranged by the resort were safe because they were conducted by PADI certified

professionals. Loya claims the scuba gear given her husband was inadequate, and the supervisor of the trip (who was under age and was not PADI certified) abandoned and failed to rescue her husband.

Loya initially filed a wrongful death claim on behalf of her and her daughters in Washington State Court. Starwood removed on the basis of diversity and admiralty jurisdiction pursuant to the DOHSA. After removal, Loya amended her complaint to plead substantive wrongful death causes of action based on the federal maritime law, which Loya argued included a strict liability claim under the Washington Timeshare Act.[1] As required by federal statute, Loya asked the District Court to award Ricardo's American beneficiaries such pecuniary relief as was authorized by DOHSA.

The District Court granted the defendant Raintree's motion for dismissal under FNC upon the Defendants' assurance that they would not object to Jurisdiction in the Courts of Mexico for the instant action on July 6, 2007, (Appendix C). The Ninth Circuit Court of Appeals affirmed the District Court's Dismissal on October 2, 2009. (Appendix B). The Ninth Circuit en banc decided not to accept review on March 22, 2010. (Appendix A).

---

1. RCW 64.36.320 (2) "[Timeshare] Promoters under the chapter shall be strictly liable for delivering promised gifts, prizes, awards, **or other items of value** offered or advertised in connection with marketing of timeshares."

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit Court of Appeals holding that a district court sitting in admiralty does not have to take into account DOHSA's exclusive remedy before dismissing a case based upon forum non conveniens grounds involves an important federal question which conflicts with this Court's recent decisions recognizing the supremacy and prudential effect of maritime statutes.

In applying the doctrine of FNC in admiralty the District Court was required to take into account Congress' intent to afford Americans who die on the high seas the exclusive remedies set forth in the Death on High Seas Act. This Court has determined federal common law making in admiralty is to be developed, in so far as possible, to harmonize with enactments of Congress. The District Court and the Ninth Circuit Court of Appeals ignored this mandate.

It was Loya's position before the District Court that the District Court must ascertain if there is anything about DOHSA which indicated that Congress implicitly spoke to, and rejected, the application of FNC doctrine to a suit thereunder. The District Court disagreed.

> DOHSA actions do not arise under the "laws" of the United States but are specifically within the admiralty jurisdiction of the federal courts. See *Pain v. United Tech. Corp.*, 637 F.2d 775, 780-81 (D.C. Cir. 1980) (noting

> that District Court does not have mandatory jurisdiction over DOHSA claims and therefore may dismiss on *FNC* grounds because a DOHSA claim does not invoke federal question jurisdiction); *Fen v. Sanko Kisen Corp.*, 441 F. Supp. 45, 48 (S.D.N.Y. 1977) "[A]n admiralty case, being not a 'federal question' case within the meaning of 28 U.S.C. 1331, is consequently subject to the rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners." **(Appendix Summary Judgment Order, p. 8:11-20).**

On appeal a majority of the panel affirmed the district Court's reliance on *Pain* for the proposition that because DOHSA sounds in admiralty the District court had extraordinary discretion to deny jurisdiction to adjudicate a claim to secure a DOHSA remedy or reasonable equivalent.

This holding, based on *Pain* - a case decided in 1980 - is clearly contrary to more recent Supreme Court teaching regarding the supremacy and prudential effect of federal legislation with regard to the application of United States' maritime common law. Recent Supreme Court analysis beginning with *Mobil Oil v Higginbotham*[2] in 1989 and most recently culminating in *Atlantic Sounding Co, Inc. v. Townsend*[3] in 2009 clearly rejects the teaching of *Pain* to the extent it was

---

2. 436 U.S. 618 (1978)

3. 129 S. Ct. 2561 (2009)

used by the district court and a majority of the panel for the proposition that when federal courts act pursuant to their admiralty jurisdiction in applying FNC they need not inquire regarding the purpose of maritime legislation.

DOHSA was enacted to overrule *The Harrisburg*, 119 U.S. 199 (1886) and provide a remedy for the wrongful death of Americans on the high seas. 46 U.S.C. App. Sec. 761.

> a) Subject to subsection (b) of this section, whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

While DOHSA does not contain a full complement of wrongful death and survival act provisions and limits the class of beneficiaries to the decedent's "wife, husband, parent, child, or dependent relatives," it was intended to provide "a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is sought." (46 U.S.C. App. § 762.)

> a) The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought. (b)(1) If the death resulted from a commercial aviation accident occurring on the high seas beyond 12 nautical miles from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, additional compensation for non pecuniary damages for wrongful death of a decedent is recoverable. Punitive damages are not recoverable. (2) In this subsection, the term "non pecuniary damages" means damages for loss of care, comfort, and companionship.

DOHSA preserved certain state-law remedies and state-court jurisdiction, *Id* [4], as well as the laws of foreign countries. Sec. 764.

> Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in **admiralty** in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding. [Emphasis added]

---

4. *Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 122 (1998)

When Congress enacted DOHSA and provided that a wrongful death action of an American for death on the high seas may be brought in admiralty, Congress set the amount of the damage remedy to be applied in a wrongful death action under DOHSA. Congress' purpose was to assure a uniform and exclusive remedy for the beneficiaries in U.S. District Courts. Thus, Congress stated (in Section 46 U.S.C. App. § 742):

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate non jury proceeding in personam may be brought against the United States or against such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

The recovery[5] in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

In summary, Congress' purpose in enacting DOHSA was to provide fair and just compensation for pecuniary loss sustained by Americans who died outside the territorial waters of the United States. Thus, this is not a case like *Piper Aircraft v Reyno*, 454 US 235, 257 (1981), where the Congress had expressed no preference regarding the choice of remedy presented to the federal courts. Here, Congress has specifically defined and legislated a preferred and exclusive recovery in admiralty for the wrongful death of someone in the position of Mr. Loya.

Given this legislative instruction it was error for the District Court and the Ninth Circuit not to consider Congress' stated intention as expressed in DOHSA, when assessing the adequacy of Mexico's wrongful death remedy. What the District Court did in this case, by use of FNC, a procedural supervening venue device, was to eliminate the approximately $1,500,000 recovery Congress intended to provide the Loyas under DOHSA and replaced it with a Mexican remedy of $13,000 — an

---

5. As will be shown *infra*, Congress' choice of the "recovery" in section 761 is significant with regard to a statutory analysis of the meaning of section 764, which also uses the same word "recovery."

amount so deficient that as a practical matter the Loyas are foreclosed from pursuing relief at all if they are forced to litigate in the Mexican courts. This result violates the command of *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978), that courts not change the recovery Congress specifically provided in DOHSA; by its FNC determination the District Court has compelled the Loyas to accept a maximum possible recovery that falls well below that to which they would be entitled in admiralty, and to such a degree that the Loyas have effectively suffered the dismissal of their action with prejudice.

In *Mobil Oil v Higginbotham*, this court stated: "when it [DOHSA] does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless". 436 U.S. 625. ". . . [W]e courts have no authority to substitute our views for those expressed by Congress in a duly enacted statute [DOHSA]." 436 U.S. 626.

Eight years later in *Offshore Logistics, Inc. v. Tallentire*[6], the Court was asked whether the OCSLA or DOHSA requires or permits the application of state law to supplement DOHSA where a death on the high seas occurred as a result of the crash of helicopter that was destined to land on a drilling rig. After analyzing DOHSA's legislative history the Court held that it was not free to use its constitutional power to develop maritime common law to supplement DOHSA's pecuniary damage remedy. "We defer to Congress' purpose in making a *uniform provision* for recovery

---

6. 477 U.S. 207 (1986)

for wrongful deaths on the high seas, an area where the federal interests are primary." [Emphasis Supplied] *Id.* at 233.

Six years later in 1994 the Supreme Court decided *American Dredging Co. v. Miller*, 510 U.S. 443 (1994). There the Supreme Court held state courts hearing maritime causes of action pursuant to the "savings to suitor clause" were not required to follow federal FNC. *Id.* at 455. This holding recognized the important role state courts play in the development and interpretation of substantive maritime law. With regard to the contention that not applying federal FNC in state courts would promote disharmony in maritime common law, the Court responded that because application of FNC was discretionary FNC did not promote "uniformity and predictability of outcome" in admiralty. *Id.* Finally, the Court noted in *American Dredging*, a case applying FNC doctrine: "While there is an established and continuing tradition of federal common lawmaking in admiralty, that law is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field." *Id.*

In *Zicherman v. Korean Air Lines Co.*,[7] the Supreme Court held the Warsaw Convention creates a cause of action where an airplane crash occurs on the high seas, but DOHSA "supplies the substantive United States law [with regard to a remedy]." Two years later in *Dooley v. Korean Air Lines Co.*,[8] the Court rejected

---

7. 516 U.S. 217, 231 (1996)

8. 524 U.S. 116 (1998)

a request to supplement DOHSA by creating a survival remedy for a decedent's pain and suffering. Relying on *Higginbotham* the Court held even in admiralty courts do not have the power to rewrite DOHSA remedies. *Id.* at 122-124.

In *Norfolk Shipbuilding & Drydock Corp. v. Garris*,[9] the Supreme Court held maritime common law recognized a cause of action for negligence occurring in territorial waters *only after determining this would not be contrary to maritime legislation.* In describing the evolution of the judiciary's role regarding the development of maritime common law the Court stated:

> Even beyond the express preemptive reach of federal maritime statutes, however, *we have acknowledged that they contain a further prudential effect. "While there is an established and continuing tradition of federal common lawmaking in admiralty, that law is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field." American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994). [Emphasis Supplied]

While this case was pending before the Ninth Circuit the Supreme Court decided *Atlantic Sounding Co, Inc. v. Townsend*,[10]. In *Townsend* the Court determined that

---

9. 532 U. S. 811 (2001)

10. 129 S.Ct. 2561 (2009). The Loyas brought *Townsend* and other recent authority to the panel's attention in a statement of supplemental authority filed on September 14, 2009.

punitive damages were available for the willful withholding of maintenance and cure. Both the majority and dissent, applying the Supreme Court's teaching post *Pain* agreed the judiciary must take into account Congressional enactments when applying maritime common law.

By relying on *Pain* to avoid examining whether DOHSA "would dictate retention of the [Loya's] case by an American court" where a foreign court provided no remedy equivalent to DOHSA the Ninth Circuit failed to follow Supreme Court instruction to consider federal statutory law in applying and developing federal maritime law.

The Ninth Circuit's holding in this case — that FNC can supervene the application of DOHSA — wrongly concludes that a court's convenience can trump the mandates of a maritime statute to provide an exclusive remedy for the death of a U.S. Citizen on the High Seas. A federal court should no more decline jurisdiction which Congress has bestowed to grant an exclusive remedy, than assume jurisdiction of matters the Constitution does not allow. *Marshall v Marshall*, 547 U.S. 293, 298, 126 S.Ct. 1735, 164 L.Ed.2d 480 (2006). DOHSA is the subject of current legislative scrutiny now as another maritime crisis, an oil spill off the coast of Louisiana, reiterates that the maritime arena involves primarily federal interests over which Congress has the paramount governmental power to develop policy and make law.[11]

---

11. DOHSA originated as a result of the lack of remedy for the passengers of the Titanic. *In Re Air Craft Crash off of Long Island*, 65 F. Supp 2d 207 (SDNY 1999). Currently, the House has passed on to the Senate Amendments to DOHSA in the Spill Act. House Report 111-521 Part I, Securing Protection For The Injured From Limitations on Liability Act. (July, 2010): Appendix E.

B. The Ninth Circuit decision is in conflict with FNC-American Tourist cases from the Eighth and Eleventh Circuits regarding the standard of deference which is to be afforded to an American Tourist plaintiff's choice of his/her home forum where the cost of foreign litigation creates a financial hardship or is economically prohibitive.

The dissent writes: "I have not found precedent for so aggressive an exclusion of an American plaintiff from American courts under the FNC doctrine in any other case, and I think it is mistaken here." Dissent, p. 14268. A consequence of this Court upholding the aggressive use of FNC in cases like this will be to encourage American defendants to forum shop under the guise that a foreign forum is more convenient thereby granting large multi-national defendants, like Starwood, Raintree and their subsidiaries immunity for their broken promises and negligent acts. This is so because the maximum recovery in Mexico for this wrongful death case is $12,000-13,000, but retention of a Mexican attorney to pursue the case will cost $50,000. No rational person will pursue litigation; this alternative forum will be no forum at all. Such unsound results are contrary to the Eighth Circuit's decision in *Lehman v. Humphrey Cayman Ltd.* 713 F.2d 339 (8th Cir. 1983) which is virtually "on all fours."

The *Lehman* court reversed the grant of an FNC dismissal as an abuse of discretion. In that case, plaintiff was a citizen of Ohio whose husband was killed when he disappeared on a rented Hobie Cat while vacationing at the Grand Cayman Holiday Inn. Humphrey Cayman was organized under the laws of the Cayman Islands and

maintained corporate offices in Tennessee. Holiday Inns was a Tennessee corporation with a registered agent in Iowa. Mrs. Lehman brought suit in federal District Court alleging, inter alia, breach of express and implied warranties of the hotel and its facilities including the rental shop and its sailboat. Defendant's motion to dismiss on the basis of FNC was granted. In reversing the District Court, the Court of Appeal duly noted the discretion to be given the trial court in determining whether a case should be dismissed on grounds of FNC. However, the Court of Appeal faithfully followed the United States Supreme Court's mandate that deference be given to a plaintiff's choice of forum and that "... courts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion to deny a citizen access to the courts of this country." *Id.* at 342.

In examining the interests of the different forums, the court found a strong interest in the United States and Iowa. Decedent was a citizen of Iowa and defendants had engaged in a systematic advertising effort to generate business in that state. Defendants' representations regarding the hotel and its facilities were directed at plaintiff's decedent in Iowa. The court further found that Iowa had a significant interest in providing a convenient forum for its citizens particularly when the only alternative forum was outside the United States. *Id.* at 344. Regarding the location of witnesses, the Court noted that while the accident took place in the Cayman Islands, most of the contractual arrangements for accommodations took place in Iowa. Therefore, many witnesses with knowledge relevant to

the warranty counts would be present in Iowa. The court further found that many of the witnesses worked for Holiday Inns obviating the need for compulsory process. Moreover, the time and expense of obtaining the testimony of foreign witnesses would be significantly lessened by modern modes of travel and communication, requests for admissions, and the taking of depositions in the Cayman Islands. *Id.* at 343.

In evaluating the choice of law issues, the Court assumed that the substantive law of the Cayman Islands would govern the dispute. But the Court held that Mrs. Lehman's warranty claims would involve issues of Iowa law. Since federal courts should not dismiss cases on FNC grounds simply because the courts may be required to apply foreign law, the District Court's choice of law basis was incorrect.

Finally, the court found the District Court erred in failing to consider the practical results of its decision to require Mrs. Lehman to litigate her dispute in the Cayman Islands. The Cayman Islands provided for a "cap" on wrongful death damages at $5000. While noting the general rule that a less favorable substantive law in the alternative forum is not conclusive on the issue of FNC, the court stated, "The court must be alert to the realities of the plaintiff's position, financial and otherwise, *and his or her ability as a practical matter to bring suit in the alternative forum.*" (*Id.* at 346 emphasis added).

Lehman was followed in *Wilson v. Humphrey's (Cayman)* 916 F.2d 1239 (8th Cir. 1990). *Wilson* involved a U.S. resident who responded to defendant's

advertisement in the United States. *Id.* at 1246. In affirming the District Court"s refusal to dismiss on grounds of forum non-conveniens the court noted,

> Great weight must be given the Wilsons' choice of forum. The inconvenience for Humphreys of litigating the case in Indiana must be balanced against the disadvantageous procedures available in the Cayman Islands for the Wilsons, the *interest of Indiana in providing a remedy for an injury stemming from a tour booked in Indiana for a group that left from Indiana*, and the hardships that the Wilsons would encounter in litigating a case at such a great distance from their home. (*Id.* at 1256 emphasis added)

The third "American Tourist" case is *Reid-Walen v. Hansen* 933 F.2d 1390 (8th Cir. 1991). That case involved a boating accident in Jamaica. Plaintiff was an American citizen as was defendant (a Missouri resident), who owned the "Yellowbird" resort in Jamaica. As in the prior two cases, the court found that all of the public and private interest factors favored a forum in the United States. In discussing the feasibility of litigating in a foreign forum, the court observed,

> ". . . *Reid-Walen's* counsel at oral argument stipulated that trying the case in Jamaica was so infeasible, both practically and financially, that Reid-Walen would not pursue the matter if unable to litigate in her chosen forum in the United States. *In this case, the "alternative forum" is really not much of a forum at all.* *Id.* at 1399 (emphasis added)

The fourth case of the "American Tourist" quartet is the Eleventh Circuit's decision in *Wilson vs. Island Sea Adventures*, 590 F 3d. 1264 (11th Cir. 2009). In *Wilson* the Eleventh Circuit adopted the standards and reasoning of *Ried - Walen*, supra. in finding courts must consider the "financial hardship" of depriving a tourist plaintiff of his or her home forum as part of an FNC analysis.

The facts in *Wilson* are almost identical to those in *Loya*. In *Wilson* the plaintiffs were tourists who purchased a discounted vacation package to the Bahamas. The vacation required as part of its terms and conditions that the Plaintiffs attend a timeshare presentation at one of the defendant's properties, the Island Seas Hotel. While at the presentation the plaintiffs purchased a banana boat towing tour ride at a kiosk in the Hotel operated by a separate vendor, who provided tourist amenities to Hotel guests and visitors. (In *Loya*, the kiosk tour desk which arranged Mr. Loya's fatal scuba dive was actually owned and operated by defendant, Raintree). In the *Wilson* case the plaintiffs notified the tour desk that two of their party could not swim. The tour operator assured them the trip was safe, while at the same time providing them with life vests which were alleged to be defective. Needless to say, one of the Wilson party drowned and an action was brought by the decedent's estate. (In Loya, the plaintiff's were told the scuba trip was safe and operated by PADI certified professionals. But this was not true and the scuba equipment was defective.)

The Eleventh Circuit found that the District Court had abused its discretion by failing to take into account

the "financial hardship" to the plaintiff's in moving the case to the Bahamas.

The District Court in this case noted but disregarded the financial infeasibility of the Loyas litigating their lawsuit in Mexico instead of their home forum. The District Court found that Mrs. Loya and her minor daughters should be forced to litigate their case in Mexico because that country had "some remedy," knowing full well that under the facts before the court that for all intents and purposes such a suit could not realistically be pursued in Mexico.

The "some remedy is enough" test to deprive an American tourist plaintiff of her home forum was rubber stamped by the Ninth Circuit.

> The district court found that Baja California Sur, Mexico provides an adequate forum because all defendants agreed to accept service, submit to the jurisdiction, and waive any statute of limitations defenses; Loya could bring a tort-based suit there; and Mexican courts would afford ***some remedy***, even though less than available in this country. (Loya's expert, a Mexican lawyer experienced in advising foreign litigants about the Mexican legal system, declared that any wrongful death recovery would be capped, in accordance with a formula driven by the highest daily minimum wage in the region, at $12,000-13,000, with little likelihood for recovery of moral damages or at least none in excess of $4,000. He also indicated that

> Mexican attorneys do not work on a contingency basis and his firm would charge about $50,000 to litigate this case.) Opinions (Appendix D).

The "American Tourist" cases from the Eighth and Eleventh Circuits recognize that an American Plaintiff's choice of his/her home forum is to be given great deference. It is only when the home forum is "oppressive and vexatious to the defendant and out of all proportion to plaintiff's convenience" that the motion for dismissal on grounds of FNC should be granted. *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524, 67 S.Ct. 828, 91 L.Ed. 1067 (1947); both the District Court and the Ninth Circuit failed to apply this stringent rule because they totally failed to take into account the economic reality of forcing the Loyas out of their home forum into a foreign court.

The application of the *Koster* deference principals articulated and followed by the Eighth and Eleventh Circuits to the present case would have required the Ninth Circuit to reject the District Court's "aggressive" application of FNC to deny an American citizen access to an American court in her home state.

American corporations soliciting Americans to travel to exotic foreign places can expect to be haled into court in the state where those solicitations are made. Those states have an interest in providing a convenient forum for their citizens who are injured as a result of these transactions. Problems associated with location of witnesses and evidence can be overcome by modern communication and discovery devices such as

depositions and requests for admissions. It is likely that Starwood and Raintree will be able to secure the attendance of their Mexican employees and partners over whom the Starwood and Raintree have great bargaining power. Most important, where the maximum recovery in Mexico is $12,000-13,000 but the cost of an attorney is $50,000, as found by both the District Court and three judge panel, the availability of the Mexican forum is "really not much of a forum at all."

It is important to note that this is not a case where a foreign national is attempting to forum shop for higher recoveries into American Courts and the District Court has used FNC to send them back to the courts of their own country and their own tort laws. *Vasquez v. Bridgestone*, 325 F3d 665 (5th Circuit 2003). Foreign nationals are not entitled to the same deference American Citizens are in US Courts. It is also important to note that this is not a "foreign commerce" business case. See e.g. *Contact Lumber Co. v. P.T. Moges Shipping Co., Ltd.*, 918 F.2d 1446, 1450 (9th Cir.1990). As pointed out by the court in *Reid-Walen*, in the modern age more and more American corporations are engaging in foreign commerce. Those corporations cannot always expect to litigate in an American forum. The principle may be summed up in the common colloquial phrase, "Their game, their rules." But an American tourist traveling to an exotic foreign location at the behest of an American corporation is in a markedly different situation, as the court observed in *Reid-Walen. Id.* at 1395. In such cases a District Court should be more appreciative of those circumstances that for all practical purposes make a foreign forum unavailable for the typical American, such as an inability to obtain any

monetary relief at all, American witnesses who refuse to return to the foreign forum because of bad experiences, and the likelihood of defendant forum shopping.

This court should resolve the conflict in the Circuits with regard to the extent of the deference which should be paid to the American Tourist's choice of a home forum. This Court should hold that District Courts must consider the economic feasibility of bringing litigation in a foreign forum and/or financial hardships that would be foisted upon plaintiffs by denying them access to their home forum pursuant to an FNC dismissal. This Court should also instruct the Circuits that States like Washington have an interest in protecting their residents from being lured into foreign countries where they may be injured as part of any FNC analysis. Further, to fail to review the Ninth Circuit decision will essentially grant American defendants like Starwood and Raintree immunity for injuries to Americans living in the Ninth Circuit for injuries to them while visiting their foreign facilities.

There is an overriding need for national uniformity with regard to establishing those legal standards which will apply to American tourists lured to overseas destinations where they are injured, and the ultimate safety of those American tourists is at issue here.

CONCLUSION

The Court should grant the Petition for Certiorari.

Respectfully submitted,

SCOTT E. STAFNE
STAFNE LAW FIRM
17207 155th Avenue N.E.
Arlington, Washington 98223
(360) 403-8700
stafnelawfirm@aol.com

Attorneys for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED OCTOBER 2, 2009

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-35571

D.C. No.
CV-06-00815-MJP

GILLIAN B. LOYA, as Personal representative of the Estate of Ricardo D. Loya, deceased and as Litigation Guardian Ad Litem for I.L. and G.L., the surviving minor children of the decedant, Ricardo D. Loya; Estate of RICHARD D. LOYA,

Plaintiffs-Appellants,

v.

STARWOOD HOTELS & RESORTS WORLDWIDE, INC., doing business as Westin Hotel Company, doing business as Westin Regina Golf Beach Resort and Club Regina Westin Hotel Company doing business as Westin Regina Golf and Spa Resort; CORPORATION MEXITURE SA DE CV, doing business as Xplora Adventours Los Cabos; PADI WORLDWIDE; PADI AMERICAS; JOHN DOES; RAINTREE RESORTS INTERNATIONAL INC, doing business as Club Regina WESTIN HOTEL MANAGEMENT LP; WHISKI JACK RESORTS AND CLUB Consent to Service; RESORT CONDOMINIUMS INTERNATIONAL LLC; DOUGLAS BECH; RAINTREE VACATION CLUB; WALKER HARMON,

Defendants-Appellees.

Appendix A

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

Argued and Submitted October 21, 2008
Submission Vacated October 30, 2008
Resubmitted August 21, 2009
Seattle, Washington

Filed October 2, 2009

Before: Diarmuid F. O'Scannlain, Pamela Ann Rymer, and Andrew J. Kleinfeld, Circuit Judges

Opinion by Judge Rymer;
Dissent by Judge Kleinfeld

OPINION

RYMER, Circuit Judge:

This appeal involves applicability of the doctrine of *forum non conveniens* to claims arising out of the death of a Washington resident while scuba diving off the coast of Mexico on an expedition arranged by the resort at which he was staying in Cabo San Lucas. In particular, it poses the question whether a claim implicating the Death on the High Seas Act (DOHSA), 46 U.S.C. § 30301 *et seq.*, is subject to dismissal on the basis of *forum non conveniens*. The district court, relying on the D.C. Circuit's opinion in *Pain v. United Tech. Corp.*, 637 F.2d 775, 780-81 (D.C. Cir. 1980), held that DOHSA actions

are within the admiralty jurisdiction of the federal courts, and are subject to discretionary dismissal. It dismissed this action after considering the private and public interest factors that inform a *forum non conveniens* decision. We agree that the doctrine of *forum non conveniens* may be invoked in this case, and conclude that the district court did not clearly abuse its discretion in applying it. Accordingly, we affirm.

I

Gillian Loya's husband, Ricardo, died in a scuba diving accident off the Mexican coast where he was vacationing at the Westin Resort & Spa Los Cabos (a Starwood Hotel and Resorts Worldwide hotel[1]) in San Jose del Cabo, Baja California Sur. The Loyas went to Cabo with friends who exchanged a timeshare they had at Whistler for one at Club Regina Los Cabos, the timeshare portion of the Westin resort that is owned by Raintree Resorts International. The scuba diving trip was arranged through Xplora Adventours Los Cabos, which worked in Cabo with the Westin. Allegedly, the guide was underage by PADI standards (PADI certifies dive centers), abandoned Ricardo, and failed to rescue him. Loya, a Washington resident, filed an action against these entities and others in Washington state court for dereliction of duty that resulted in her husband's wrongful death. The complaint also asserted claims under the Washington Consumer Protection Act

---

1. Starwood takes the lead on appeal, and we refer to all defendants collectively as "Starwood."

(WCPA) and the Washington Timeshare Act (WTA) for falsely advertising that the Westin Resort provided safe scuba diving activities. Starwood removed on the basis of diversity and admiralty jurisdiction. Loya then amended the complaint to charge Raintree with violating the WTA and WCPA by failing to consent to personal jurisdiction in Washington.

When Loya sought partial summary judgment on her state law claims, Starwood cross-moved for dismissal on the ground of *forum non conveniens*. The district court denied Loya's motion but granted Starwood's. In doing so, the court rejected Loya's argument that the doctrine of *forum non conveniens* is inapplicable because DOHSA provides the exclusive remedy for American beneficiaries and mandates venue in a United States district court. Instead, relying on *Pain*, the court held that DOHSA actions are within the admiralty jurisdiction of the federal courts and, whether or not DOHSA applies to this action, the Act does not preclude *forum non conveniens* dismissal. The court then ruled that an adequate alternative forum was available. After considering private and public interest factors, it concluded that dismissal was appropriate for the main reasons that Baja California Sur, Mexico is a more convenient forum, and the nucleus of Loya's case is the place where the accident occurred.

Loya timely appeals.[2]

II

At its core, Loya's position is that DOHSA effectively precludes dismissal on grounds of *forum non conveniens*. As she recognizes, nothing in DOHSA says so, but she maintains that Congress did not intend for the *forum non conveniens* doctrine to eliminate access by an American beneficiary to a remedy under DOHSA for the wrongful death of an American on the high seas.

DOHSA was enacted in 1920 to overrule the Supreme Court's decision in *The Harrisburg*, 119 U.S. 199 (1886), that admiralty afforded no remedy for wrongful death in the absence of an applicable state or federal statute. 46 U.S.C. § 761 *et seq.* The Act created a remedy in admiralty for wrongful deaths more than "a marine league" from shore (§ 761), limited the class of beneficiaries (§ 761), established a two-year period of limitations (§ 763), and provided that the recovery shall be a "fair and just compensation" for the pecuniary loss sustained by the persons for whose benefit the suit is brought (§ 762). It also preserved the right to maintain suit in admiralty in the courts of the United States whenever a right of action for wrongful death is granted

---

2. After argument we requested and received supplemental briefing on the substantive law that may govern Loya's claim for wrongful death, and its implications for the *forum non conveniens* analysis. We appreciate both parties' response.

by the law of a foreign state. *Id.*, § 764. DOHSA was amended in 2006 and recodified at 46 U.S.C. § 30301 *et seq.* Although the language changed somewhat, the changes are not material for purposes of this appeal.

Loya argues that the district court's foundational error was following *Pain*, which erroneously led it to conclude at the outset that dismissal was an option, instead of applying a choice of law analysis under *Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *as modified*, 861 F.2d 565 (9th Cir. 1988), to determine whether DOHSA implicitly speaks to and rejects the application of *forum non conveniens*. In *Pain*, an American citizen who lived in Norway was killed, along with others, in a helicopter crash into the North Sea, and decedents' survivors brought suit against the American manufacturer. They argued that their DOHSA claim arose under the laws of the United States within the meaning of the district court's federal question jurisdiction and that the court's jurisdiction was thus mandatory. The court of appeals held otherwise, noting that DOHSA provides only that a suit may be maintained " 'in the district courts of the United States, *in admiralty*.' " *Pain*, 637 F.2d at 781 (quoting 46 U.S.C. § 761) (emphasis in original).[3] DOHSA continues to

---

3. Section 761 provided:

> [W]henever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the

(Cont'd)

authorize only a "civil action brought *in admiralty*." 46 U.S.C. § 30302 (emphasis added). Loya distinguishes *Pain* because it involved multiple plaintiffs just one of whom was an American, whereas here the only plaintiff is a resident of the state of Washington; but that difference has nothing to do with the text of the statute itself, which plainly states that a DOHSA action lies in admiralty. The doctrine of *forum non conveniens* is well accepted in admiralty law. *See e.g., American Dredging Co. v. Miller*, 510 U.S. 443, 449-50 (1994).

Zipfel does not lead to a different result. The district court there had dismissed on grounds of *forum non conveniens* a claim under the Jones Act, 46 U.S.C.

(Cont'd)

> Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

In its present form, 46 U.S.C. § 30302, the statute provides:

> When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.

§ 688, filed on behalf of an American seaman and foreign seamen killed in an aircrash in Indonesia. Reversing as to the American seaman, we reiterated our rule in Jones Act cases that a court must first make a choice of law determination before dismissing for *forum non conveniens*. *Zipfel*, 832 F.2d at 1482 (citing *Pereira v. Utah Transport, Inc.*, 764 F.2d 686, 688 (9th Cir. 1985)). Although we decided that foreign law applied to the claims of the foreign seamen, it was conceded that American law — the Jones Act — applied to the claim on behalf of the deceased American seaman.[4] This, we concluded, foreclosed dismissal as to the American for *forum non conveniens* because the Jones Act has a specific venue provision.[5] DOHSA has no analogous

---

4. We determined that foreign law applied to the claims of the foreign seamen by considering the factors set out in *Lauritzen v. Larsen*, 345 U.S. 571, 583-92 (1953), also a Jones Act case. These factors are: place of the wrongful act; law of the flag; allegiance or domicile of the injured; allegiance of the shipowner; place and choice of law of the contract; inaccessibility of a foreign forum; and law of the forum. An eighth factor — the shipowner's base of operation — was added by the Court in *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 308-09 (1970).

5. "Jurisdiction in [actions under the Jones Act] shall be under the court of the district in which the defendant employer resides or in which his principal office is located." 46 U.S.C. § 688(a). The Jones Act incorporates the Federal Employers' Liability Act (FELA), 46 U.S.C. § 688(a), which also has a specific venue provision: "Under this chapter an action may be brought in a district court of the United States, in the district court of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U.S.C. § 56.

(Cont'd)

provision. For this reason, *Zipfel*: threshold choice of law analysis is not dispositive. *Lueck v. Sundstand Corp.*, 236 F.3d 1137, 1148 (9th Cir. 2001) (holding that the *Zipfel* choice of law analysis is only determinative when the case involves a United States statute requiring venue in the United States, such as the Jones Act or the FELA). As we explained in *Lueck*, the purpose of a choice of law inquiry in a *forum non conveniens* analysis is to determine if the Jones Act, or the FELA, with special provisions mandating venue in the United States district courts, would apply. *Id.* at 1148 (citing *Creative Tech., Ltd. v. Aztech Sys. Pte., Ltd.*, 61 F.3d 696, 700 (9th Cir. 1995)). Albeit without citing *Zipfel*, the district court considered the impact of DOHSA on the applicability of *forum non conveniens*, and contrasted an action arising under DOHSA with an action arising under a statute such as the Jones Act. We see no reversible error in its conclusion that this action is amenable to discretionary dismissal, for DOHSA does not entitle Loya to have her case heard in a United States court.[6]

(Cont'd)

The Jones Act provision has been recodified at 46 U.S.C. § 30104(b): "An action under this section shall be brought in the judicial district in which the employer resides or the employer's principal office is located."

6. We also see no reversible error on account of the district court's failure expressly to consider the *Lauritzen* factors. They would only have led to the conclusion that Loya's claim was not subject to a statute with a specific venue provision such as the Jones Act. *See Zipfel*, 832 F.2d at 1482.

Loya suggests that using the doctrine of *forum non conveniens* to dismiss her claim undercuts the exclusive DOHSA remedy that Congress intended to provide in a United States district court, thus contravening the Supreme Court's enjoinder in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 624-25 (1978), that "when [DOHSA] does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Id.* at 625. DOHSA, of course, does not "speak directly" to the issue of mandatory jurisdiction. In any event, the doctrine of *forum non conveniens* is "nothing more or less than a supervening venue provision" that goes to "process rather than substantive rights." *American Dredging*, 510 U.S. at 453. The doctrine "does not bear upon the substantive right to recover." *Id.* at 454. Consequently, dismissing on grounds of *forum non conveniens* does not run afoul of *Higginbotham*.

Loya further posits that because Congress enacted DOHSA to provide "a uniform and effective wrongful death remedy for survivors of persons killed on the high seas," *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 214 (1986), the district court may not, through use of *forum non conveniens*, abrogate the rights of United States beneficiaries to the "fair and just compensation for the pecuniary loss" that Congress intended to provide.[7] However, just as the *forum non conveniens*

---

7. Prior to the 2006 amendments, DOHSA provided:

> [T]he recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by

(Cont'd)

doctrine does not expand the substantive law on wrongful death, the doctrine does not contract it, either. Application of the doctrine simply shifts the forum where the claim will be decided.

Loya relies on *Howard v. Crystal Cruises*, 41 F.3d 527 (9th Cir. 1994), where we upheld the district court's determination that DOHSA governed the wrongful death claim of an American who was injured while disembarking a cruise ship of Bahamian registry operated by a California corporation in Mexico. However, *Howard* does not support Loya's position; it did not involve the doctrine of *forum non conveniens*. The question there was whether DOHSA, as opposed to general maritime law, could apply to death in the

---

(Cont'd)

> the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

46 U.S.C. § 762.

In its present form, DOHSA provides:

> The recovery in an action under this chapter shall be a fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought. The court shall apportion the recovery among those individuals in proportion to the loss each has sustained.

46 U.S.C. § 30303.

territorial waters of another country. We concluded that it could, and in that context opined that "there is nothing inherently absurd with the notion of an American court applying American law to an action filed by an American plaintiff against an American defendant, particularly when the law in question was expressly designed to cover wrongful deaths occurring outside the territorial boundaries of the United States." *Id.* at 529-30. This does not mean that the doctrine of *forum non conveniens* is unavailable if DOHSA applies.

Accordingly, we hold that DOHSA neither explicitly, nor implicitly, rejects application of the doctrine of *forum non conveniens*.

III

Given our conclusion that the district court *could* dismiss on grounds of *forum non conveniens*, the remaining question is whether it clearly abused its discretion in doing so. *American Dredging*, 510 U.S. at 455 (noting that the *forum non conveniens* determination is committed to the sound discretion of the trial court and may be reversed only when there has been a clear abuse of discretion); *Creative Tech.*, 61 F.3d at 699 (same). "[W]here the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *American Dredging*, 510 U.S. at 455 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981)); *Creative Tech.*, 61 F.3d at 699.

"A party moving to dismiss on grounds of forum non conveniens must show two things: (1) the existence of an adequate alternative forum, and (2) that the balance of private and public interest factors favors dismissal. This showing must overcome the 'great deference . . . due plaintiffs because a showing of convenience by a party who has sued in his home forum will usually outweigh the inconvenience the defendant may have shown.' " *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 767 (9th Cir. 1991) (quoting *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1449 (9th Cir. 1990)). Private interest factors include "(1) relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of hostile witnesses, and cost of obtaining attendance of willing witnesses; (3) possibility of viewing subject premises; (4) all other factors that render trial of the case expeditious and inexpensive. " *Creative Tech.*, 61 F.3d at 703 (quoting *Zipfel*, 832 F.2d at 1485). Public interest factors include "(1) administrative difficulties flowing from court congestion; (2) imposition of jury duty on the people of a community that has no relation to the litigation; (3) local interest in having localized controversies decided at home; (4) the interest in having a diversity case tried in a forum familiar with the law that governs the action; (5) the avoidance of unnecessary problems in conflicts of law." *Id.* at 703-04.

The district court found that Baja California Sur, Mexico provides an adequate forum because all defendants agreed to accept service, submit to the jurisdiction, and waive any statute of limitations

defenses; Loya could bring a tort-based suit there; and Mexican courts would afford some remedy, even though less than available in this country. (Loya's expert, a Mexican lawyer experienced in advising foreign litigants about the Mexican legal system, declared that any wrongful death recovery would be capped, in accordance with a formula driven by the highest daily minimum wage in the region, at $12,000-13,000, with little likelihood for recovery of moral damages or at least none in excess of $4,000. He also indicated that Mexican attorneys do not work on a contingency basis and his firm would charge about $50,000 to litigate this case.)

Addressing the private interest factors, the court found that the relative ease of access to sources of proof and obtaining witnesses favor Starwood, as does the fact that a Mexican judgment would be enforceable in the United States. It noted that, although Loya has sued American defendants rather than the Mexican subsidiaries of Starwood and Raintree, Ricardo Loya's death and the activities leading up to the accident occurred in Mexico and that, other than Gillian Loya (who was not on the dive), Ricardo Loya's diving partner (who lives in California and will not willingly go to Cabo), and the friends with whom the Loyas went on the trip, potential liability witnesses and relevant documentation are located in Mexico.[8] In the trial court's view, other factors did not favor either side.

---

8. These include employees of the Club Regina Los Cabos and of the company that arranged the scuba diving trip; the person who drove Ricardo Loya to Cabo Pulmo, where the dive

(Cont'd)

With respect to public interest factors, the court found that court congestion in Baja California Sur weighs in favor of Loya. While Washington has an interest in preventing misrepresentations to its residents about the safety of a Mexican vacation, the court held that Mexico's substantial interest in holding businesses operating in Mexico accountable and insuring that foreign tourists are treated fairly favors Starwood given that the gravamen of Loya's complaint is that Starwood, operating in Mexico, caused Ricardo Loya's death. In evaluating the public interest in having trial in a forum familiar with the governing law, the court looked to the test Washington applies to determine choice of law (if laws conflict, then the laws of the forum with the "most significant relationship" govern). It concluded that Mexican law may apply to some issues, particularly the applicable standard of care and interpretation of any liability release signed by Ricardo Loya. In the court's view, the need to apply foreign law strongly favors dismissal based on *forum non*

(Cont'd)

trip began; the captain of the dive boat; the owner and employees of the dive shop, including dive instructors and an instructor who assisted in the search; the captain of the boat that transported Ricardo Loya back to the dock; the driver of the truck that brought him to a doctor; employees of Xplora Adventours; and the Mexican officials who investigated the accident. The evidence shows that documentary evidence relating to the corporate structure of certain Starwood and Raintree entities will be found outside the state of Washington. A release may have been executed when Ricardo Loya signed up for the trip.

conveniens. Finally, the court found no cause to burden Washington jurors with this litigation given that most of the allegedly wrongful conduct took place in Mexico and among non-Washington defendants.

Considering all these factors, the district court found that dismissal was appropriate for two important reasons: Baja California Sur is an adequate alternative forum, and the nucleus of Loya's case is where Ricardo Loya's accident occurred. On balance, the court believed that the public and private factors weigh in favor of Starwood. Thus, it concluded that Baja California Sur is the more convenient, therefore appropriate, forum.

Loya emphasizes the heightened deference owed to American citizens suing American defendants in their home forum. We afford greater deference to a plaintiff's choice of home forum because it is reasonable and convenient. However, the deference due is "far from absolute." *Lockman Found.*, 930 F.2d at 767 (noting that we have recognized that "[t]he presence of American plaintiffs . . . is not in and of itself sufficient to bar a district court from dismissing a case on the ground of *forum non conveniens*") (quoting *Cheng v. Boeing Co.*, 708 F.2d 1406, 1411 (9th Cir. 1983)). A district court has discretion to decide that a foreign forum is more convenient. *See, e.g., Piper Aircraft*, 454 U.S. at 257; *Lockman Found.*, 930 F.2d at 767; *Contact Lumber*, 918 F.2d at 1449. Here, Baja California Sur is where the scuba diving trip was arranged, documented, outfitted,

undertaken, and investigated.[9] We cannot say that the court acted unreasonably in deciding that these circumstances made Baja California Sur a more convenient, and appropriate, forum.

Loya also focuses on the considerable difference in potential recovery, as well as in the cost of pursuing this action, in Mexico. The remedy afforded may not be "so clearly inadequate or unsatisfactory that it is no remedy at all." *Lockman Found.*, 930 F.2d at 768. However, that the law, or the remedy afforded, is less favorable in the foreign forum is not determinative. *Piper Aircraft*, 454 U.S. at 247 (stating that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveninens* inquiry."). A foreign forum must only provide the plaintiff with "some" remedy in order for the alternative forum to be adequate. *Lueck*, 236 F.3d at 1143-44 (rejecting the plaintiffs' argument that New Zealand offered no remedy for their losses because it

---

9. The district court recognized that Loya also asserts claims against some defendants for false advertising and that proof of those claims is more accessible in the United States, but believed that the wrongful death claim is central. This is not unreasonable. Except for her claim against Raintree for failing to consent to service of process, all of Loya's claims revolve around the claim that negligence of various people in Mexico caused Ricardo Loya's death. We have reviewed Loya's state law claims to the extent necessary to satisfy ourselves that they are neither the centerpiece of her action, nor of sufficient merit to give Washington more than a slight interest in their resolution.

has legislated tort law out of existence, and noting that the district court was not required to ask whether plaintiffs could bring this lawsuit there but rather, whether New Zealand offered "a" remedy). Unquestionably, Mexico provides a remedy for breach of contract and for wrongful death. Having taken all of these considerations into account, the district court's conclusion that Baja California Sur was nevertheless a more convenient forum is not unreasonable. *See Piper Aircraft*, 454 U.S. at 249 (observing that convenience is the central focus of the *forum non conveniens* inquiry, and rejecting the notion that the possibility of an unfavorable change in law should be given substantial weight so as to bar dismissal even where trial in the chosen forum is plainly inconvenient).

Further, Loya contends that the choice of law issues should have been resolved by application of the *Lauritzen* factors rather than by Washington choice of law rules. This is not, however, an argument that she made in the district court. As the judge observed, Loya did not contradict Starwood's choice of law analysis. Loya's only response to Starwood's submission that Mexican substantive law would apply was that the district court was familiar with DOHSA and with the laws of Washington that would apply when construing the Timeshare Act and the Consumer Protection Act. Therefore, the argument that she now makes is waived. Even so, Loya does not explain why or how the *Lauritzen* factors would require a different outcome. In these circumstances, we decline to upset the district court's view that Mexican law may apply to the

applicable standard of care and interpretation of any liability release signed by Ricardo Loya.[10]

Finally, Loya submits that the district court offered no explanation why enforceability of a Mexican judgment in the United States would make Mexico a better forum. This factor did not, however, figure into the court's conclusion that Mexico was a more convenient forum; the court simply indicated that it favored Starwood.

In sum, the trial court considered all the relevant factors and balanced the interests reasonably. Given this, we owe its decision substantial deference.

IV

We conclude that the Death on the High Seas Act, unlike the Jones Act, does not preclude dismissal on the basis of *forum non conveniens*. The district court found that Baja California Sur is an adequate alternative forum, reasonably balanced the public and private interest factors that inform a *forum non conveniens*

---

10. That the court's view is not unreasonable is well illustrated by the Seventh Circuit's opinion in *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 845-46 (7th Cir. 1999). There, an Illinois resident fell while he was a guest at a Sheraton resort in Acapulco. Affirming the district court's determination that Mexico had the most significant relationship with the case and that Mexican law would govern the substantive issues, the court of appeals pointed out the absurdity of Spinozzi's position that he should be able to carry with him the tort law of his state provided that he stayed in a hotel that had advertised in Illinois.

determination, and concluded that Baja California Sur is a more convenient, thus appropriate, forum. Accordingly, it dismissed this action on grounds of *forum non conveniens*. In doing so, it did not clearly abuse its discretion.

AFFIRMED.

Appendix A

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent. The district court treated *forum non conveniens* as less than the "exceptional tool to be employed sparingly"[1] that it is, and applied it overly aggressively. The district court, as we agree, erred as a matter of law by failing to apply the *Lauritzen*[2] factors to choice of law. While the plaintiff has not made clear how application of the correct factors would change the result, and should have, the error of law in failing to apply the *Lauritzen* factors affected an already dubious *forum non conveniens* determination, so we ought to give the district court an opportunity to apply correct law before we say it makes no difference.

Though the death giving rise to this case occurred in Mexico's waters, the American connections with the case are very substantial indeed. Loya was American, as are his wife—who is personal representative of his estate—and his children. Loya died, as we understand the facts, while scuba diving at the Westin resort in Cabo San Lucas, a death that might have been prevented had the resort used someone competent and properly certified to manage his oxygen tank, and had the potential rescue vessel not passed by without performing a rescue. The Loyas' lawsuit focuses on the American timeshare and resort companies that they claim ought to have assured higher safety standards to Americans vacationing in their resort in Mexico.

---

1. *Ravelo Monegro v. Rosa*, 211 F.3d 509, 514 (9th Cir. 2000).

2. *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

By contrast, in *Piper Aircraft Co. v. Reyno*,[3] the Supreme Court decision laying out the *forum non conveniens* law we must apply, a U.K. air taxi crashed a U.K.-owned plane in the Scottish highlands, killing the pilot and passengers, all of whom, along with their heirs and next of kin, were Scottish. And in *Lauritzen v. Larsen*,[4] every substantial connection to the case except for the Cuban location of the injury was Danish, as the Court took pains to lay out:

> Larsen, a Danish seaman, while temporarily in New York joined the crew of the Randa, a ship of Danish flag and registry, owned by petitioner, a Danish citizen. Larsen signed ship's articles, written in Danish, providing that the rights of crew members would be governed by Danish law and by the employer's contract with the Danish Seamen's Union, of which Larsen was a member. He was negligently injured aboard the Randa in the course of employment, while in Havana harbor.[5]

I agree with the majority that the Death on the High Seas Act controls, and that the doctrine of *forum non conveniens* applies to Death on the High Seas Act claims. And I agree that under *Howard v. Crystal*

---

3. 454 U.S. 235 (1981).

4. 345 U.S. 571 (1953)

5. *Lauritzen*, 345 U.S. at 573.

Cruises[6] we are bound to apply the Death on the High Seas Act even though Loya's death was not on what are commonly understood to be the "high seas." The failure of a passing vessel to rescue Loya falls within the category of traditional maritime activity under *Taghadomi v. United States*.[7]

Where we disagree is in the application of the doctrine of *forum non conveniens*. I have not found precedent for so aggressive an exclusion of an American plaintiff from American courts under the doctrine in any other case, and I think it is mistaken here.

The Supreme Court decision in *Piper Aircraft Co. v. Reyno*.[8] gives us the necessary guidance. That Scottish air crash, described above, was properly dismissed for *forum non conveniens*, and the Court rejected the Third Circuit view that more favorable law, alone, in the plaintiff's choice of forum was sufficient reason to deny *forum non conveniens* dismissal. The decision reaffirmed, though, that the "plaintiff's choice of forum should rarely be disturbed."[9] The rule in *Piper* is that *forum non conveniens* dismissal is appropriate only "when trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,' or when the

6. 41 F.3d 527 (9th Cir. 1994).

7. 401 F.3d 1080 (9th Cir. 2005).

8. 454 U.S. 235 (1981).

9. *Id.* at 241.

'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems.' "[10] That stringent rule has not been applied in this case. *Piper* read the Court's earlier decision in *Gulf Oil Corp. v. Gilbert*[11] to mean that "dismissal may be warranted where a plaintiff chooses a particular forum, not because it is convenient, but solely in order to harass the defendant or take advantage of favorable law."[12]

Piper carefully qualified its rule that law more favorable to the plaintiff is not a good ground automatically to deny *forum non conveniens* dismissal. "[I]f the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice."[13] That is the case here. The Loya family has no practical Mexican remedy. The papers set out that their remedy in Mexico would be limited to damages of about $ 17,000, and that they would be required to spend over $ 50,000 to secure that remedy.

In addition to the impracticality of any remedy in Mexico, the Loyas face an insuperable obstacle in

---

10. *Id.* (quoting *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)).

11. 330 U.S. 501 (1947).

12. *Piper*, 454 U.S. at 249 n.15.

13. *Id.* at 254.

proving their case there. The decedent's diving partner is unwilling to go to Mexico again. That is plausible, considering the horrible experience, and the deterrent of knowing that Mexican law does not provide compensation if he dies there.

Our disagreement is limited to application of law to facts, but that matters. *Piper* holds that there is no "rigid rule" governing discretion, just a multi-factor set of considerations, and "each case turns on its facts."[14] The Loyas ought to be able to sue in Washington—their and the decedent's home—from where they arranged their Mexican vacation with an American company and the Mexican companies it partnered with.

14. *Id.* at 249.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE DATED AND FILED JULY 6, 2007

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C06-0815MJP

GILLIAN B. LOYA, et al.,

Plaintiffs,

v.

STARWOOD HOTELS & RESORTS et al.,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION TO DISMISS ON *FORUM NON CONVENIENS* GROUNDS

This matter comes before the Court on Plaintiffs' motion for summary judgment regarding personal jurisdiction, venue, and violations of the Washington Consumer Protection Act (Dkt. No. 68) and Defendants' cross-motion to dismiss on *forum non conveniens* grounds (Dkt. No. 117). Having considered the parties' briefs, and the documents submitted in support thereof, the Court DENIES Plaintiffs' motion and GRANTS

Defendants' cross-motion. This action is DISMISSED on *forum non conveniens* grounds.

Background

This case arises from the death of Ricardo Loya. Mr. Loya died on May 26, 2005, while scuba diving off the coast of Mexico during a vacation in which the Loyas were registered guests at Club Regina Los Cabos, a timeshare in Los Cabos, Baja California Sur, Mexico. Mr. Loya's wife, Gillian Loya, has sued on behalf of herself, in her capacity as the personal representative of Mr. Loya's estate, and as guardian ad litem for her two daughters, for damages resulting from Mr. Loya's death.

The Loyas traveled to Mexico with their friends, David and Deborah Jones. In 1999, the Joneses purchased a timeshare at Whistler from Defendant Whiski Jack. This purchase entitled the Joneses to timeshare rights at Whistler and to exchange rights at resorts around the world including at the Club Regina facility. The Joneses exercised those rights and brought the Loyas with them to Club Regina as their guests.

Plaintiffs have sued the following Defendants in connection with Mr. Loya's death: Raintree Resorts International, Whiski Jack Resorts, Douglas Bech, Walker Harmon, Westin Hotel and Resorts, Starwood Trust, Corporation Mexiture S.A. de C.V. dba Xplora Adventour Los Cabos, PADI Americas, PADI Worldwide, and Resort Condominiums International.

Appendix B

Raintree Resorts International ("Raintree") owns the timeshare resort, Club Regina Los Cabos. Whiski Jack Resorts is a Whistler, British Columbia, resort and is a division of Raintree. Raintree Vacation Club is also associated with Raintree. Defendants Douglas Bech and Walker Harmon own ten percent or more shares in Raintree Resorts International. Club Regina Los Cabos is the timeshare portion of a resort, the hotel portion of which is called The Westin Resort & Spa Los Cabos. That hotel is owned by Defendant Starwood Hotels & Resorts Worldwide, also known as "Starwood Trust." Corporation Mexiture S.A. de C.V. dba Xplora Adventour Los Cabos is the company that arranged Mr. Loya's scuba diving trip. According to Plaintiffs' complaint, Xplora was acting in concert or pursuant to a joint venture with Defendants Starwood and Raintree in providing leisure activities, including arranging scuba diving trips, for guests at the Westin Resort. Defendants PADI Worldwide and PADI Americas certify dive centers worldwide. Resort Condominiums International maintains a timeshare exchange business for Raintree members. (Am. Compl. ¶ 21.)

In their amended complaint, filed on March 5, 2007, Plaintiffs allege that Defendants Starwood, Raintree, RCI, and Xplora negligently breached their duty to provide Mr. Loya with a safe diving experience, and that such breach was the proximate cause of his death. Plaintiffs allege that Defendants PADI acted negligently by inadequately investigating and policing the Westin's claims about PADI certification. Plaintiffs also allege claims under the Washington Consumer Protection Act

("WCPA") and the Washington Timeshare Act against Defendants Starwood, Raintree, RCI, and Xplora for falsely advertising in Washington and Mexico that the Westin resort provided safe scuba diving activities. And Plaintiffs allege that Raintree violated the Washington Timeshare Act and the WCPA by failing to consent to personal jurisdiction in Washington.

Plaintiffs filed their original complaint in King County Superior Court on May 16, 2006. The action was removed to this Court and on September 7, 2006, Defendant Raintree moved to dismiss for lack of personal jurisdiction. On November 30, 2006, the Court granted Plaintiffs additional time to conduct jurisdictional discovery. On March 1, 2007, Plaintiffs filed a motion requesting that the Court affirmatively determine that it has personal jurisdiction over Defendant Raintree and that the Western District of Washington is an appropriate venue. Plaintiffs also move on their Washington Timeshare Act claim against Defendant Raintree. On March 15, Raintree, Starwood, Westin Hotel, and Xplora filed a cross-motion requesting that the Court dismiss this action on *forum non conveniens* grounds. On March 19, Defendant Raintree filed a notice informing the Court that it would *not* be renewing its motion to dismiss based on a lack of personal jurisdiction. On June 12, 2007, the Court requested supplemental briefing on the *forum non conveniens* issue. (Dkt. No. 160.) Specifically, the Court requested that all defendants announce whether they are willing to submit to jurisdiction in Mexico for purposes of this lawsuit. Having received responses

from all defendants in this action, these matters are now ripe for the Court's consideration.

Discussion

I. Personal Jurisdiction

Plaintiffs argue that this Court has personal jurisdiction over Defendant Raintree. As mentioned, Raintree notified the Court that it is no longer contesting personal jurisdiction in this matter. (Dkt. No. 124.) Because Raintree consents to personal jurisdiction, the Court has personal jurisdiction over Raintree and need not consider Plaintiffs' arguments on this matter.

II. Washington Consumer Protection Act

Plaintiffs allege that Defendant Raintree violated the Washington Timeshare Act, RCW 64.36 et seq., and the Washington Consumer Protection Act, RCW 19.86 et seq., by failing to consent to service and by asserting defenses based on personal jurisdiction.

A. Timing under Rule 56(a)

As an initial matter, Defendants argue that Plaintiffs' motion regarding the Timeshare Act is premature under Fed. R. Civ. P. 56(a). Federal Rule 56(a) states that a claimant "may, at any time *after the expiration of 20 days from the commencement of the action* or after service of a motion for summary judgment by the adverse party, move . . . for a summary judgment . . . ."

(Emphasis added.) Plaintiffs alleged their Timeshare Act claims for the first time in their amended complaint, filed on February 28, 2007. (Dkt. No. 67.) The next day, Plaintiffs filed this motion for summary judgment. (Dkt. No. 68.)

Whether Rule 56(a) requires a twenty-day waiting period for filing summary judgment motions after the filing of an *amended* complaint need not be resolved here. Even if Plaintiffs technically violated the Rule 56(a) timing provision, it would be inefficient to strike the motion as unripe where the parties have fully briefed the merits of the underlying claim. The Court will consider the merits of Plaintiffs' Timeshare Act claims.

B. Violation of Washington Consumer Protection Act / Timeshare Act

Plaintiffs argue that Raintree's actions — failing to consent to service and moving to dismiss for lack of personal jurisdiction and venue — violated the Washington Timeshare Act, RCW 64.36.035. Plaintiffs argue that the Washington Consumer Protection Act ("WCPA"), RCW 19.86, provides a cause of action for the Timeshare Act claim.

1. Cause of Action

Plaintiffs argue that they have a cause of action under the WCPA for unfair and deceptive trade practices. The applicable WCPA provision states: "Unfair methods of competition and unfair or deceptive

acts or practices in the conduct of any trade or commerce are hereby declared unlawful." RCW 19.86.020. To bring a private cause of action for a WCPA violation, a plaintiff must establish five elements: (1) an unfair deceptive act or practice; (2) in trade or commerce; (3) which affects the public interest; (4) injury to plaintiff in his or her business or property; and (5) a causal link between the unfair or deceptive act complained of and the injury suffered. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986).

Plaintiffs have failed to make the requisite showing to establish a cause of action under the WCPA. Plaintiffs point to RCW 64.36.170, which states that "[a]ny failure to comply with [the Timeshare Act] constitutes an unfair and deceptive trade practice under chapter 19.86." But even assuming that Plaintiffs could show that Defendants failed to comply with the Timeshare Act by contesting jurisdiction and failing to consent to service of process in Washington, Plaintiffs have not alleged that they were harmed in business or property. And they have not even attempted to establish a causal link between the alleged Timeshare Act violations and any injury suffered.[1] Thus, Plaintiffs have failed to even assert the requisite elements of a WCPA claim. *See Hangman*

---

1. In their complaint, Plaintiffs state that Defendants' challenge to personal jurisdiction "caused plaintiffs and their attorneys substantial time, costs, and expense." (Am. Compl. ¶ 50.) But Plaintiffs have not asserted in their motion that these legal costs constitute the basis of their WCPA/ Timeshare Act claim.

Ridge, 105 Wn.2d at 784 (holding that all five elements must be met for plaintiff to prevail in private CPA action).

2. Defendants have not violated the Washington Timeshare Act

Even if Plaintiffs had a cause of action under the WCPA or the Timeshare Act itself,[2] Plaintiffs have not established that Defendant Raintree violated the Timeshare Act. Plaintiffs argue that Raintree's failure to consent to service and filing of a motion to dismiss for lack of personal jurisdiction and venue based on corporate shield defenses violated RCW 64.36.035. That provision in the Timeshare Act states as follows:

> **§ 64.36.035. Applications for registration, consents to service, affidavits, and permits to market — Authorized signatures required — Corporate shield disclaimer prohibited**
>
> (1) Applications, consents to service of process, affidavits, and permits to market shall be signed by the promoter, unless a trustee or person with power of attorney is specifically authorized to make such signatures. If the signature of a person with a power of attorney or trustee is used, the filing of the signature shall include a copy of

2. Plaintiffs have not even attempted to establish a direct or indirect cause of action under the Timeshare Act itself.

> the authorizations for the signature. No promoter or other person responsible under this chapter shall disclaim responsibility because the signature of a trustee or attorney in fact, or other substitute was used.
>
> (2) If the promoter is a corporation or a general partnership, each natural person therein, with a ten percent or greater interest or share in the promoter, shall, in addition to the promoter, be required to sign as required in this section, but may authorize a trustee or a person with power of attorney to make the signatures.
>
> (3) All persons required to use or authorizing the use of their signatures in this section, individually or otherwise, shall be responsible for affidavits, applications, and permits signed, and for compliance with the provisions of this chapter. Individuals whose signatures are required under this section shall not disclaim their responsibilities because of any corporate shield.

RCW 64.36.035. Plaintiffs maintain that this provision requires timeshare promoters to consent to personal jurisdiction and service of process in Washington. The Court does not agree with Plaintiffs' reading of the statutory text. The above provision mandates *which* person(s) or entity in the timeshare business must sign documents such as consents to service of process. It

does not *require* consent to service of process. And even if it did, the statute is silent on the issue of personal jurisdiction. Under Fed. R. Civ. P. 4(a), a defendant who waives service of process "does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant." Raintree therefore did not violate RCW 64.36.035 when it contested personal jurisdiction.

Plaintiffs' argument that Defendants violated RCW 64.36.120(3) is equally strained. That section provides that "[a]ny provision in a timeshare contract or agreement which designates jurisdiction or venue in a forum outside this state is void with respect to any cause of action which is enforceable in this state." RCW 64.36.120(3). Plaintiffs argue that this provision requires timeshare promoters doing business in Washington to allow Washington residents to litigate their claims in Washington.

Plaintiffs' argument confuses the statutory provision with a contractual forum selection clause. Had Raintree presented a timeshare contract that mandated a non-Washington forum, Plaintiffs would have a valid argument that the agreement was void under RCW 64.35.120(3). But Defendants have not asserted that any agreement controls the choice of forum here. Defendants' argument that this case would be more conveniently litigated in another forum does not conflict with the statute.

In conclusion, Plaintiffs have failed to establish a violation of the Timeshare Act. Plaintiffs do not have a cause of action under the WCPA and they have not asserted a cause of action under the Timeshare Act itself. Even if they did have such a cause of action, Plaintiffs' claim is premised on an unsupportable interpretation of the Timeshare Act. The Court denies summary judgment on this issue.

III. *Forum Non Conveniens*

Defendants seek to dismiss this case on grounds of *forum non conveniens*. Plaintiffs argue that this Court provides the most appropriate forum for this litigation.

"The *forum non conveniens* determination is committed to the sound discretion of the trial court." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981). "A party moving to dismiss based on *forum non conveniens* bears the burden of showing (1) that there is an adequate alternative forum, and (2) that the balance of private and public interest factors favors dismissal." *Dole Food Co. v. Watts*, 303 F.3d 1104, 1118 (9th Cir. 2002) (citing *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142-43 (9th Cir. 2001)). "The plaintiff's choice of forum will not be disturbed unless the private interest and public interest factors strongly favor trial in the foreign country." *Id.*

Appendix B

A. Preliminary Matters

1. Impact of Death on the High Seas Act

Plaintiffs argue that a *forum non conveniens* defense is inapplicable here because a federal statute — the Death on the High Seas Act ("DOHSA") — applies and mandates venue in U.S. district court. DOHSA provides a cause of action in U.S. District Courts for the surviving relatives of decedents who died on the high seas:

> When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.

46 U.S.C. § 30302. Contrary to Plaintiffs' assertion, DOHSA does not mandate venue in the United States. Unlike actions arising under statutes like the Jones Act, DOHSA actions do not arise under the "laws" of the United States but are specifically within the admiralty jurisdiction of the federal courts. *See Pain v. United Tech. Corp.*, 205 U.S. App. D.C. 229, 637 F.2d 775, 780-81 (D.C. Cir. 1980) (noting that district court does not have mandatory jurisdiction over DOHSA claim — and therefore may dismiss on *forum non conveniens*

grounds — because a DOHSA claim does not invoke federal question jurisdiction); *Fen v. Sanko Kisen Corp.*, 441 F. Supp. 45, 48 (S.D.N.Y. 1977) ("[A]n admiralty case, being not a 'federal question' case within the meaning of 28 U.S.C. 1331, is consequently subject to the rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners." (internal quotation marks and citations omitted)). Thus, whether or not DOHSA applies to this action, it does not preclude *forum non conveniens* dismissal.

2. Impact of RCW 64.36.120

Plaintiffs point to RCW 64.36.120(3) and argue that Defendants may not rely on a *forum non conveniens* defense because the parties have "agreed" upon an appropriate venue. But, as explained above, the parties have not agreed on a venue. An applicable statutory provision does not constitute an agreement between the parties. And RCW 64.36.120(3), which would void an applicable forum selection clause, is not itself a forum selection clause that trumps a *forum non conveniens* defense. RCW 64.36.120 does not apply to this analysis.

B. Adequacy of Alternative Forum

"An alternative forum ordinarily exists when defendants are amenable to service of process in the foreign forum." *Watts*, 303 F.3d at 1118. "A foreign forum is adequate when it provides the plaintiff with a sufficient remedy for his wrong." *Id.*

Appendix B

Baja California Sur, Mexico provides an adequate alternative forum. First, all defendants have agreed to accept service of process and submit to jurisdiction in a Mexican court and waive any statute of limitations defenses for a 120-day period immediately following dismissal here. (*See* Dkt. Nos. 117, 161-64.) Baja California Sur, Mexico, is therefore an available alternative forum. *See Watts*, 303 F.3d at 1118. Second, Mexico is an adequate forum. Defendants present a declaration from a Mexican attorney who states that the Loyas could bring a contract and/or tort based suit in Mexico. (Dkt. No. 119, Gonzalez de Castilla Decl. at 3.) As he explains, the remedy for a wrongful death tort suit in Baja Sur, Mexico, is the highest daily minimum wage in the region, (b) multiplied by four, (c) extended by the number of days provided for by the labor law (790 days). (*Id.* at 4.) He also states that the Loyas could pursue a claim for "moral damages," which are similar to loss of consortium damages, but concedes that such damages are infrequently awarded. (*Id.* at 5.)

Plaintiffs argue that Mexico is not an adequate forum because they have sued mostly American corporations and citizens and because any remedy obtained in Mexico would be limited. Plaintiffs present the declaration of Rosendo Lopez-Mata, a senior partner at a bilingual Mexican law firm with a special emphasis in advising foreign litigants about the Mexican legal system. (*See* Dkt. No. 142, Lopez-Mata Decl.) Mr. Lopez-Mata states that any wrongful death recovery will be capped at about $ 12,000-13,000, that it is very unlikely Plaintiffs would recover any moral damages, and that

even if they did, those damages would amount to about $ 4,000. (*Id.* at 2-3.) Mr. Lopez-Mata also explains that Mexican attorneys do not work on a contingency basis, that his firm would charge about $ 50,000 to litigate this case, and that prevailing parties are generally not awarded attorneys fees. Thus, Mr. Lopez-Mata opines that the actual costs of bringing this wrongful death claim in Mexico would exceed the available recovery for Mrs. Loya and her children. (*Id.* at 4.)

Even considering Mr. Lopez-Mata's declaration, the Court concludes that Mexico is an adequate alternative forum. All of the defendants have consented to jurisdiction in Mexico. And Plaintiffs and Defendants agree that Mexican courts would provide Plaintiffs with some remedy for the wrongs asserted. The fact that Plaintiffs' potential recovery is greater in Washington than in Baja California Sur, Mexico, does not make the Mexican forum inadequate. As the Supreme Court explained in *Piper Aircraft*, the fact that the alternative forum's substantive law is decidedly less favorable to the plaintiff should not be given substantial weight in *forum non conveniens* determinations. 454 U.S. at 247. Where the alternative forum offers a remedy for the plaintiff's claims, and there is no danger that she will be treated unfairly, the foreign forum is adequate. *Id.* at 255. Because a Mexican court would have jurisdiction over all defendants, and because Plaintiffs may pursue wrongful death and contract claims in that forum, Plaintiffs have an adequate alternative forum in Baja California Sur, Mexico.

C. Private Interest Factors

The Court must consider the following private interest factors in deciding whether to dismiss on *forum non conveniens* grounds: "the relative ease of access to sources of proof, the availability of compulsory process for unwilling witnesses, the comparative cost of obtaining willing witnesses, the possibility of a view of any affected premises, the ability to enforce any judgment eventually obtained, and 'all other practical problems that make trial of a case easy, expeditious, and inexpensive.'" *Monegro v. Rosa*, 211 F.3d 509, 512 (9th Cir. 2002) (quoting *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)).

1. Relative ease of access to sources of proof

Defendants argue that proof would be more easily accessed in Mexico. As they explain, besides Ms. Loya, their friends the Jones, and Ms. Daune Fink (Mr. Loya's diving partner), all presently identified or potential liability witnesses are located in Mexico. (Somers Decl. ¶ 5.)[3] Defendants identify the following Mexican

---

3. Plaintiffs moved to strike the Somers' declaration on hearsay grounds and because, Plaintiffs allege, Somers' declaration is not based on personal knowledge. To the extent that Mr. Somers declaration identifies witnesses that he believes are likely to have relevant information concerning the incidents leading to Mr. Loya's death, it is not hearsay and is based on Mr. Somers' own knowledge. Mr. Somers states that, as "Project Manager" at Club Regina Los Cabos, he directed the investigation of Mr. Loya's death. The motion to strike is DENIED.

witnesses: employees and management of the timeshare resort, employees of the company that arranged the scuba diving trip, the person who drove Mr. Loya to the scuba dive trip, the boat captain, the owner and employees of the dive shop, the diving instructors, including the dive instructor who assisted in the search for Mr. Loya, the doctor who pronounced Mr. Loya dead, and Mexican federal, state, and local officials who investigated Mr. Loya's death. (*Id.*) They also note that documentary evidence relating to the corporate structure of Starwood Defendants is outside Washington and that evidence relating to the Mexican entities is presumably located in Mexico. Finally, Mr. Loya may have signed a contractual liability release, which is located in Mexico and which will require application of Mexican law to determine interpretation and validity.[4]

Plaintiffs' argue that proof will more easily be accessed in Washington. Plaintiffs contend that American defendants Raintree, Starwood, and RCI misrepresented to them in Washington and in Mexico that scuba diving trips would be safe and overseen by certified divers and that evidence of these misrepresentations is available in Washington. (*See* Stafne Decl., Exs. 1-3.) They point out that evidence

4. It is not clear whether Mr. Loya actually signed the release. (*See* Somers Decl., Ex. A.) The Court agrees with Plaintiffs that this document is not readable. The Court only relies on the document to the extent it suggests that Mr. Loya *may* have signed a liability release, not as proof that he signed this particular release.

of Defendants' negligence in advertising will come from Defendants' corporate offices in the United States. They assert that they have copies of Mexican police reports that establish that boy who acted as diving guide was not old enough to be PADI certified. They also assert that expert testimony can be obtained here. (Oakley Decl.) Plaintiffs also point out that in addition to the Loyas, Defendants Starwood, Raintree, RCI, Bech, Harmon, PADI Americas, and PADI Worldwide are all American entities or citizens. Plaintiffs have not sued the Mexican subsidiaries of Starwood and Raintree, but instead have only sued the American parent corporations.

Although Plaintiffs have sued some American defendants, this factor as a whole weighs in favor of Defendants. The gravamen of Plaintiffs' complaint is a wrongful death action.[5] Mr. Loya's death, and the activities leading up to his accident, occurred in Mexico. A trial of that action will require evidence from people who were present before, during, and after Mr. Loya's accident, and documentation of the accident and the investigation. Those sources of proof are predominantly located in Mexico.

---

5. The Court recognizes that Plaintiffs have also sued some Defendants for false advertising, and that proof as to those claims will be more easily accessible in the United States. But all of Plaintiffs' claims revolve around their main claim that Defendants' negligence caused Mr. Loya's death. And it is that wrongful death claim that should be the focus of the Court's analysis.

2. Compulsory Process / Cost of Obtaining Witnesses

Because some of Plaintiffs' witnesses, including Mrs. Loya, Mr. Loya's diving partner, Daune Fink, and Plaintiffs' experts, live in the United States, Plaintiffs argue that a trial in Mexico will be a costly endeavor. On the other hand, Defendants have identified many witnesses whose testimony will be pertinent to the wrongful death inquiry, all of whom reside in Mexico. It appears that the majority of liability witnesses reside in Mexico. Most of those witnesses, because they are outside the control of Defendants, cannot be compelled to testify in Washington. Although this Court may issue letters rogatory to request assistance from a foreign court in obtaining discovery, Defendants will still have to bear the cost of bringing witnesses to Washington. Although this factor does not strongly favor either party, because the majority of witnesses whose testimony will be pertinent to the wrongful death inquiry reside in Mexico, this factor favors Defendants.

3. Other practical problems

Defendants argue that issues of standard of care for rescue procedures and medical care will require experts familiar with the standard of care in Mexico. They also argue that trying the case here will cause a time delay. They assert that trying the case in Mexico will be comparatively inexpensive and more efficient. Plaintiffs contradict that argument with Mr. Lopez-Mata's declaration in which he states that the litigation

will take more time in Mexico and will not be economically viable. He also offers a report by the National Law Center for Inter-American Trade regarding tort law in Mexico that states that "the ability of an injured plaintiff to compel a wrongdoer to turn over documents and other potential evidence (discovery) is much more limited in Mexico. Essentially, the plaintiff must specify with exactitude the documents or evidence he or she wishes the wrongdoer to turn over . . . ." (Lopez-Mata Decl. & Ex. 3.) Given the competing problems, this factor does not favor either side.

4. Judgment enforceable

A Mexican judgment against the American defendants would be enforceable in the United States. Defendants' expert explains how a Mexican judgment will attach to Defendants' in Mexico. (Gonzales de Castilla Decl. at 7.) The recognition of foreign judgments in the United States is governed by state law. *See Tonga Air Servs. v. Fowler*, 118 Wn.2d 718, 726, 826 P.2d 204 (1992). Like many states, Washington has adopted the Uniform Foreign Money-Judgments Recognition Act, RCW 6.40 et seq., which provides for enforcement of foreign judgments. *See* RCW 6.40.030. Because any judgment against Defendants will be enforceable in Mexico and/or the United States, this factor favors Defendants.

5. Relative advantages and obstacles to fair trial

Defendants argue that a trial in Mexico would remove the obstacles mentioned above, and that therefore this factor weighs heavily in favor of Mexico. Plaintiffs argue that they would not obtain any remedy if this case is moved to Mexico because it would be economically prohibitive. This factor does not favor either party.

D. Public Interest Factors

The Court needs to consider the following public interest factors: "court congestion, the unfairness of burdening citizens in an unrelated forum with jury duty, the interest in having localized controversies decided at home, the interest in trying the case in a forum familiar with the applicable law, and the interest in avoiding unnecessary conflicts of laws." *Monegro*, 211 F.3d at 512 (citing *Gilbert*, 330 U.S. at 508-09).

1. Administrative Difficulties / Congestion

Comparing the relative dockets of this Court and that in Mexico weighs in favor of the parties litigating here. This Court has a relatively low case load and is particularly effective in moving parties toward trial within a short period of time. In contrast, Plaintiffs' expert states that courts in Baja California Sur, Mexico, are among the most congested in Mexico. (Lopez-Mata Decl. at 4.) Mr. Lopez-Mata estimates that this action

would take about 581 days to litigate in Mexico. (*Id.*) Defendants have not presented any evidence to dispute the docket congestion in Mexico. This factor weighs in favor of Plaintiffs.

2. Local Interest in Having Localized Controversies Decided at Home

Mexico and Baja California Sur have substantial interests in this case. Mr. Loya's scuba diving accident took place in Baja California Sur, Mexico. Mexico has an interest in holding businesses operating in Mexico accountable and insuring that foreign tourists are treated fairly. Washington has some interest in this case. Plaintiffs are residents of Washington. Plaintiffs allege that some of the defendants targeted Plaintiffs and their friends, through advertising in Washington. Washington has interest in preventing such misrepresentations and tortious conduct.

On balance, this factor weighs in favor of Defendants. As mentioned, the gravamen of Plaintiffs' complaint is that Defendants, operating in Mexico, caused Mr. Loya's death. Mexico has the stronger interest in this case.

3. Interest in having trial in forum that is at home with the law that must govern the action

The parties disagree about which law would apply in this case. In determining choice of law, Washington courts first decide whether the relative laws conflict. If

they do, Washington courts use the "most significant relationship" test set forth in the Restatement (Second) of Conflict of Laws (Restatement of Conflicts) § 145 (1971). *Williams v. State*, 76 Wn. App. 237, 241, 885 P.2d 845 (1994). Under this test, choice of law depends upon which of two or more jurisdictions has the "most significant relationship" to a specific issue. *Id.* Therefore, each State's interests must be analyzed in relation to each issue presented. *Id.*

Defendants argue that at least one conflict exists between the laws of Mexico and Washington that will require a choice of law analysis: Mexico caps the damages recoverable in a wrongful death action, whereas under Washington law, non-economic damages for wrongful death are unlimited. (*Compare* Gonzales de Castilla Decl. *with* RCW 4.20.020.) Defendants assert that Mexican law will apply because the Mexican resort was owned and operated by Mexican companies (subsidiaries of American companies) and Mr. Loya's death occurred in Mexico. Plaintiffs do not contradict Defendants' choice of law analysis. Plaintiffs only assert that this Court is familiar with DOHSA, the Washington Timeshare Act, and the Washington Consumer Protection Act.

The Court need not engage in a full choice of law analysis at this stage. *See Piper Aircraft*, 454 U.S. at 251 ("The doctrine of *forum non conveniens* . . . is designed in part to help courts avoid conducting complex exercises in comparative law."). It appears that Mexican law may apply to some issues, particularly the applicable

standard of care and interpretation of any liability release signed. This Court is not familiar with Mexican law. The need to apply foreign law strong favors dismissal based on *forum non conveniens. Piper*, 454 U.S. at 260.

4. Avoidance of Unnecessary Problems in Conflict of Laws, or in the Application of Foreign Law

The fact that this Court will be asked to untangle conflicts of laws and apply the law of Mexico, which is foreign, weighs in favor of dismissal. *See Piper Aircraft*, 454 U.S. at 251.

5. Burden of jury duty on community which has no relation to the litigation

Defendants assert that all alleged wrongful conduct occurred in Mexico and that litigating this case here would place an unfair burden on Washington jurors who have no relationship to this litigation. But Plaintiffs argue that Defendants deceived Washington consumers in both Washington and in Mexico. Plaintiffs argue that Washington jurors have an interest in adjudicating claims made by Washington citizens against corporations doing business in Washington.

Even considering Plaintiffs' Consumer Protection Act claims, this factor weighs in favor of Defendants. The majority of the alleged wrongful conduct took place in Mexico and among non-Washington defendants. Washington jurors should not be burdened with this litigation.

Appendix B

E. Dismissal on *Forum Non Conveniens* Grounds

After considering all these factors, the Court concludes that *forum non conveniens* dismissal is appropriate for two important reasons: (1) Baja California Sur, Mexico, is an adequate alternative forum, and (2) the nucleus of Plaintiffs' case is the place where Mr. Loya's accident occurred — Baja California Sur, Mexico. Although Plaintiffs are citizens of this country, "a United States citizen has no absolute right to sue in a United States court." *See Mizokami Bros. of Arizona, Inc. v. Baychem Corp.*, 556 F.2d 975, 977 (9th Cir. 1977). The Supreme Court has explained that the central focus of the *forum non conveniens* inquiry is convenience. *Reyno*, 454 U.S. at 249. Here, as a whole, the public and private interest factors weigh in favor of Defendants, leading to the conclusion that Mexico is a more convenient, and therefore appropriate, forum. Because Baja California Sur, Mexico is a more convenient forum for Plaintiffs' litigation, the Court DISMISSES this case on grounds of *forum non conveniens*.

Appendix B

Conclusion

The Court DENIES Plaintiffs' motion for summary judgment and GRANTS Defendants' cross-motion for summary judgment. Because Defendant Raintree is no longer challenging personal jurisdiction, the Court denies as moot Plaintiffs' motion for summary judgment on the issue of personal jurisdiction. The Court also denies Plaintiffs' motion as it relates to Defendants' alleged violations of the Washington Timeshare Act because Plaintiffs do not have a cause of action under the Timeshare Act or the Washington Consumer Protection Act. Even if they did, Plaintiffs' argument is premised on an incorrect interpretation of the Timeshare Act. Finally, the Court grants Defendants' motion for *forum non conveniens* dismissal. Because Baja California Sur, Mexico, is an adequate and more convenient forum for this litigation, this action is DISMISSED.

The Clerk is directed to send copies of this order to all counsel of record.

Dated: July 6th, 2007.

s/ Marsha J. Pechman
Marsha J. Pechman
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 22, 2010

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-35571

GILLIAN B. LOYA, as Personal representative of the Estate of Ricardo D. Loya, deceased and as Litigation Guardian Ad Litem for I.L. and G.L., the surviving minor children of the decedant, Ricardo D. Loya; et al.,

Plaintiffs - Appellants,

v.

STARWOOD HOTELS & RESORTS WORLDWIDE, INC., doing business as Westin Hotel Company, doing business as Westin Regina Golf Beach Resort and Club Regina Westin Hotel Company doing business as Westin Regina Golf and Spa Resort; et al.,

Defendants - Appellees.

D.C. No. CV-06-00815-MJP
Western District of Washington, Seattle

Appendix C

ORDER

Before: O'SCANNLAIN, RYMER and KLEINFELD, Circuit Judges.

A majority of the panel voted to deny appellants' petition for rehearing en banc. Judge Kleinfeld voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. A judge of the court requested a vote on whether to rehear the matter en banc. However, the matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.